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IN THE
Supreme Court of the United States
OCTOBER TERM, 1948.
No. 441.

AMERICAN SAFETY TABLE COMPANY,
Petitioner,

vs.

SINGER SEWING MACHINE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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We regret that a reply is required here but statements made by Amicus and Singer do need correction. Nothing could be more unjust and unfair than to treat American's case (No. 441) as though it were the same as Universal's (Nos. 439 and 440). The facts, proof, charges and findings of the court below, and the issues on this application for certiorari are very different. Yet, in an attempt to have this Court repeat the errors committed below in treating both cases the same, we find the following in the briefs of Amicus and Singer.

(a)

Amicus mis-states the "Questions Presented" (Amicus Brief, p. 2). It omits to point out in its Question 1 that in American's case the lower court's inquiry and decision was had in the *absence of any allegations, proof or finding that the judgment under attack was obtained by fraud upon the Court of Appeals or that in its rendition anyone of the judges of that court had been influenced improperly by your petitioner or by Kaufman in this case.* The omission by Amicus of this fact which particularly distinguishes this case from the Universal case does not square with the duty placed upon Amicus in this case to "present to the Court the available evidence bearing upon the charges whether or not in support thereof to the end that the truth might be ascertained" (Op. 44-45).

Petitioner's Questions 1 and 2 correctly present important questions which should be reviewed by this Court because in American's case there was the absence of any charge, allegation or proof of fraud.

Nowhere in the record did Singer allege any fact tending to prove that the judgment under attack was procured by fraud upon the court or that any member thereof was improperly influenced to grant the judgment in this case. Hence, the court below received no evidence and made no finding as to any such fraud or improper influence on the part of American. Nevertheless, Singer incorrectly asserts at page 2 of its brief that petitioner's Questions 1 and 2 (and also 6) have "no foundation in fact".

(b)

Petitioner's Question number 3 has no parallel in the Universal case. It presents for review whether on this record there was any evidence sufficient to justify reopening the judgment and dismissing the complaint. In this question, which is touched on by Amicus in its brief at page 2 under its Question 2, Amicus would have this Court understand that the only question is whether the evidence supported the one finding which the court made.

But the question to be considered by this Court actually involves also the proposition of law that even if there were evidence, which we deny, that a litigant employed a lawyer because it thought he had influence, in the absence of proof that the judgment was affected by the employment of such lawyer, has the court power to reopen the judgment and dismiss the complaint? This question of law is not presented in the Universal case but it is of primary importance in this case.

Had all of the charges against American been found by the court as they were found in the Universal case, it may be that the power to dismiss the complaint existed. But the finding on only one of them cannot support here the judgment of dismissal. It is absurd to imply as Amicus (Amicus Brief, p. 5, n. 6 & p. 9) and Singer (Singer's Brief, p. 3) do that American consented to such a procedure.

(c)

Amicus incorrectly attempts to create the impression that material and important facts in American's case were largely undisputed (Amicus Brief, p. 9).

It does not square with the duty imposed upon Amicus by the court below that it fails to apprise this Court that all the testimony of every witness bearing directly on the essential issue of why American employed Kaufman is absolutely contrary to the finding of the court below (see our petition, p. 12).

(d)

Singer falsely charges in its brief, page 7, that Becker's name was not brought out into the open until the examination of Harry Frankel, on April 15, 1948. Singer knows this to be false because Amicus on March 25, 1948, had already served notice of the time and place of taking Becker's deposition (see Notice of Time and Place of Taking Depositions and Singer's own statement to the court, Document R, p. 11, filed March 23, 1948).

(e)

As to the important issue as to what American knew about Kaufman or why it employed him, Amicus in no way answers or explains its failure to call Becker to which attention is sharply called in our petition, pages 12 and 13, and which appeared to be of importance to the court below (Op., p. 49, n. 8).

Amicus does not reply to the self-evident proposition that having given notice that it intended to call Becker as a witness, the failure to go forward and introduce his testimony would support the inference that Becker's testimony would not have been contradictory or unfavorable to American.

Amicus does not apprise this Court that unlike the situation in the Universal case, Kaufman was not

under any "stand-by" retainer with American and that the uncontradicted testimony is that he was employed to render admitted and legitimate services in the selection and employment of ex-Judge Haight and Samuel Darby, Jr., at very reasonable fees, that he held conferences on the case and that he continued to render services to American as his file demonstrated.

So even on this one issue as to the purpose for which American retained Kaufman, neither Amicus nor Singer answer the charge made in our brief, page 30, that the finding of the court below was not made on that clear, unequivocal and convincing evidence which would leave the issue free from doubt.

This presents as a matter of law to this Court the question of whether on such inconclusive evidence admittedly so different than that introduced in the Universal issue, the Court of Appeals had the power to reopen its judgment and dismiss American's complaint.

Further, as pointed out in our petition, page 13, on review, this Court will find that all of the circumstantial evidence supports the direct evidence that the employment of Kaufman was consistent with an entirely innocent interpretation of American's action under the circumstances in which it found itself.

Conclusion.

The Court should satisfy itself as to whether the indignation of the court below at the situation so far as Kaufman and Davis are concerned, did not blind that court to the great difference between Universal's case and that of your petitioner, American Safety Table Company, and that in all fairness and in justice to the substantial property rights of American Safety

Table Company so arbitrarily taken away by the order of the court below, the whole record should now be reviewed by this Court and this application should be granted so that justice may be done.

Respectfully submitted,

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